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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 467

IN THE MATTER OF V-I-D, INC.,

Debtor,

KELLEY, GLOVER & VALE, Incorporated, Trustee,

Petitioner,

vs.

CHARLES J. KRAMER and HELEN KRAMER, and PETER EVANS, Successor Indenture Trustee,

Respondents.

REPLY BRIEF OF PETITIONER.

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I.

Respondents' Brief impliedly confesses the basic error of both courts below, of expressly flouting the Indiana statute and decisions. (Tr. 126, 198 F. 2d at p. 395).

This confession takes the form of devoting their entire brief to arguing that the first mortgage claimants could have recovered under Indiana law, plus their statement that petitioner's quarrel is with "certain language" of the opinion. (Br. 8).

Our primary grievance is not with the "language" of the opinion, or even the unjust "result" to petitioner (though the injustice is great). The important ground for certiorari is the **dangerous and dictatorial ground and doctrine** of the decision below, as a precedent. This is shown by the following decisions which the respondents cite against themselves. (Br. 8-9):

> "The function of this court is to *resolve conflicts* of decision and to *settle important principles of law.*" (Our italics).
>
> *Deputy* v. *duPont,* 308 U.S. 488, 84 L. Ed. 416, 60 S. Ct. 363.

> "The jurisdiction to bring up cases by certiorari from the Circuit Court of Appeals was given for two purposes: First, to secure *uniformity* of decision between those courts in the nine circuits; and second, to bring up cases involving *questions of importance* which it is in the *public interest* to have decided by this court of last resort."
>
> *Magnum Import Company* v. *Houbigant, Inc.,* 262 U.S. 159; 67 Law Ed. 922, 43 Sup. Ct. 531.

II.

The question whether respondents **could** enforce the first mortgage and bonds against this real estate in the state courts of Indiana under Indiana law is not the important question now, and need not be determined in ruling upon this petition, either: (1) because this Court will not decide questions which should have been but were not determined below, or (2) because such questions will be deferred until this Court decides the case on the merits.

But if the merits were now before this Court, respondents' statements of law and fact are entirely erroneous and misleading because:

A.

This was a Business Loan of the Bank's Money.

Contrary to respondents' statement that Home Bank and Trust Company was an "inactive trustee" and the "situs of this loan was in Chicago, Illinois" (Br. 3), the District Court made its opinion its finding of facts (Tr. 101) and expressly found in its opinion:

> "The evidence was to the effect that the Home Bank and Trust Company, an Illinois Corporation, was *never licensed* to do business in Indiana; that Lawrence H. Prybylski was a *vice-president* of the bank; that the *bank* made a number of *loans* on Indiana property similar to the (here involved) *Baran* loan; and that *it ceased to exist* as a bank institution about 1935. Some of the mortgages were executed in Indiana and others in Chicago. The Baran mortgage was *executed in Gary, Indiana.* It was the practice of the bank that *after* the trust indentures were signed and recorded and the mortgage bonds were registered at the bank, the *loans* were paid out in Chicago and the bank proceeded to sell the bonds. Under these circumstances, it is concluded that the Home Bank and Trust Company *was doing business in Indiana* at the time of the *execution of the trust indenture.*" (Our italics.) (Tr. 97, 98.)

As indicated in the above finding of the District Court, this mortgage was one of "a number of loans on Indiana property" made by this bank in *carrying on its investment banking business in Indiana.* Respondent Evans so testified (Tr. 49-51) and so did Baran's attorney, Malcjewski, who said this bank made this loan in *competition* with a similar bank in Indianapolis, Indiana (Tr. 62).

Respondent Evans also testified it was the *bank's money* which went to Baran on this loan: "We would pay to the man who *borrowed,* give him the money" (Tr. 54).

The fact that the bank *afterwards* sold these mortgage bonds to undisclosed purchasers at undisclosed times *does not give the bondholders any better lien on the real estate than the bank had* (except a holder in due course as discussed, *infra*). *An assignee or transferee of a non-complying foreign corporation which could not have enforced its claim in the state, is in no better position than the corporation.* To hold otherwise would judicially sanction and encourage evasion of important state laws designed to control foreign corporations:

> **20 C.J.S. Corporations, Sec. 1843, p. 66 at note 90.**
>
> **Standard v. Cantwell (Tex. C.A. 1926), 286 S. W. 760, 7620763 (applying rule to assignee of mortgage notes).**
>
> **Association Collectors Inc. v. Hardman (1940) 2 Wash. 2d 414, 98 P. 2d 318, 319.**

No rights of holders in due course are here involved. Neither opinion below raises the point. The record is devoid of any evidence that respondent Evans, as the bank's successor indenture trustee, presently represents any bondholder who purchased before maturity (1934), or who any such bondholders are or the amount of their holdings. The only identified bondholders are Kramer and wife, holders of $101,000.00 principal amount of the $135,000.00 bond issue (Tr. 124), all of which they purchased as bartering speculators at cut rates after the 1934 maturity date. The District Court's memorandum opinion finds:

> "The evidence was also to the effect that, beginning about 1936, the claimants Kramer and Kramer purchased bonds issued *under* the Baran mortgage, many of the bonds being acquired in exchange for *merchandise*. Some of the bonds were purchased for as low

as 15% of their face value and some as high as 35% of their face value." (Tr. 98.)

A person not a holder in due course is a *mere assignee* who takes the bonds subject to all defenses which might have been made against them in the hands of the original holder, the bank.

Sec. 19,-402, Clause 2, Burns Ind. Stats. 1933.
Baum v. Nord (1928) 88 Ind. App. 674, 680, par. 2, 164 N.E. 294, 296, par. 2.

All claims of the bondholders against this real estate are necessarily *derived* from the bank and *its transaction* in making this loan. This appears on the face of the bonds themselves as set forth in Kramer's claim (Tr. 3) and by the fact that the first mortgage indenture gives either the bank or the bondholders the right to "foreclose *this* trust deed" upon default (Tr. 83). Respondents' argument on this point simply emphasizes that the bondholders' claim against the real estate is *derived through* the bank's mortgage and *the bank's transaction.*

B.

Individual Trustees were Bank Officers.

The bank's original co-trustee, Prybylski, was the bank's vice-president, as recited in the above finding of the District Court and that was "the only reason he was named in these trust indentures" according to Evans' testimony (Tr. 56, top).

Evans was named in the original trust indenture mortgage as the bank's successor trustee "with identical powers and authority" (Tr. 85) because he was the bank's president (Tr. 47). The District Court *substituted* him as trustee under the mortgage during the hearing on the